IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

S.B. CRIMINAL APPEAL NO.328/1988
(Poonja & Ors. Vs. State)

Date of order : May 07th, 2007

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. B.N. Kalla, for the appellants.
Mr. L.R. Upadhyay, Public Prosecutor.

This criminal appeal is directed against the judgment dated 08.08.1988 passed by District & Sessions Judge, Dungarpur in Sessions Case No.1/1988. The learned Sessions Judge convicted appellant Poonja for offences punishable under Sections 366, 376 and 344 and sentenced him to suffer three years RI with a fine of Rs.1500/-, seven years RI with a fine of Rs.3000/- and one year RI with a fine of Rs.500/- respectively for each offence. Appellant Dheera was convicted under Sections 366, 376 and 344 I.P.C. and sentenced to suffer three years RI with a fine of Rs.1500/-, seven years RI with a fine of Rs.3000/- and one year RI with a fine of Rs.500/- respectively for each offence. Appellant Sanna @ Shyamlal was

convicted for offence under Section 376 I.P.C. and sentenced to suffer seven years RI and for offence under Section 344 I.P.C. sentenced to suffer one year RI with a fine of Rs. 500/-. Appellant Hurma was convicted for offence under Section 344 I.P.C. and ordered to undergo sentence of one year RI with a fine of Rs.500/-. All the sentences were directed to run concurrently.

Brief facts of the case are that on 7.10.1987 at about five - six P.M., when complainant Shanti left her parental house at Village Kesarpura and was going to her in-laws' house at Village Bhachria, in midst her way, accused-appellants Punja and Dheera met her and forcibly took her to 'nala' towards the roadside and two other co-accused Sanna @ Shyamlal and Jawara also came on the spot and all these four persons took her to the house of accused Dheera where accused-appellants Punja and Dheera committed rape upon her.

Thereafter, on the next day, she was forcibly taken to the godown of Punja at village Mala-Kasba where she was locked and in the night accused Punja and Dheera again committed rape. Thereafter, she was taken to the house of accused Hurma and she was kept there for three nights and raped by accused-appellants Punja and Dheera and at last she was taken to the house of accused-appellant Sanna where she was

confined for seven days.

On 22.10.1987, complainant Shanti lodged FIR at Police Station Dhambola, District Doongarpur, whereby six persons namely Punja, Sanna, Dheera, Jawara, Hurma and Bhoori were named in the FIR. The Police registered the FIR against all the six persons for committing offence under Sections 376 and 366, I.P.C. All the persons named in the FIR were arrested and after usual investigation challan was filed before the Munsiff & Judicial Magistrate, Doongarpur. Thereafter, the case was committed to the Sessions Court, Dungarpur for trial where charges were framed against the accused-persons. Having recorded the evidence in the case, the learned Sessions Judge convicted four accused-persons for the alleged offences as above and acquitted two persons namely Jawara and Hurma.

During trial, learned Sessions Judge recorded statements of ten prosecution witnesses namely PW-1 Uda, PW-2 Batha, PW-3 Kalu Singh, PW-4 Bhagwan Lal, PW-5 Smt. Shanti, PW-6, Ram Lal, PW-7 Laxman, PW-8 Vaga, PW-9 Bhim Singh and PW-10 Dhula. Fifteen documents were exhibited and thereafter, statements of the accused under Section 313 Cr.P.C. were recorded. No defence evidence was produced by the accused-appellants.

Learned trial court while relying upon the statement of prosecutrix PW-5 Shanti, convicted the accused-appellants as above for the alleged offence. In the finding arrived at by the learned trial court, it has been held that as per the statement of prosecutrix PW-5 Shanti, her testimony cannot be disbelieved.

Learned counsel for the appellants, first of all, contended that testimony of prosecutrix is totally false because the FIR has been filed on 22.10.1987 with regard to the alleged incident, which had taken place on 7.10.1987. It is also contended that according to the FIR, PW-5 Shanti (prosecutrix) herself filed FIR on 22.10.1987 narrating that she was illegally confined by the accused-appellants till 19.10.1987 for near about 12 days and she was carrying pregnancy of five months but due to rape committed upon her by the accused-appellant, abortion took place and due to this reason, she was not able to file FIR within time and now she is filing FIR for taking action against the accused persons. It is contended that the story narrated by prosecutrix is totally false because it is not supported by medical evidence. Learned counsel for the appellants also contended that medical jurist has given clear-cut finding that no recent sign of abortion and intercourse was observed

at the time of medical examination. This fact itself speaks that the prosecution story narrated by the prosecutrix is totally false and uncorroborated. The opinion given by Doctor clearly speaks that at the time of examination, Doctor found that there was no sign of sexual intercourse observed. Though, medical jurist was not produced before the court but the said Ex.P/7 – medical report of prosecutrix itself betrays the prosecution case from which it appears that prosecution story is totally false.

It is further contended by the counsel for the appellants that there is complete doubt in the prosecution story regarding occurrence because the prosecution has failed to produce any independent witnesses. Clothes worn by the prosecutrix at the time of alleged incident were not recovered nor were sealed and produced during the verification nor any clothes/material was sent for chemical examination. The story of prosecution is false on this ground also that if a lady is repeatedly raped by more then three persons within a period of 12 days then obviously, there must be any sign of rape found at the time of medical examination but there is no corroborative medical evidence of rape and abortion but the learned trial court gave its finding on the basis of surmises and conjuctures and no plausible explanation has been given by the learned Sessions Judge while relying upon

the evidence of prosecutrix. Therefore, the finding of learned trial court is erroneous and deserves to be set aside.

Further, it is contended that the facts of this case speak in volume that if a lady is not traceable for near about 15 days, then, obviously report is required to be filed before the police station; but, in the present case as per the prosecution story from 7.10.1987 to 19.10.1987, she was illegally detained by accused persons and they committed rape upon her but no FIR was filed either by husband, father or brothers of prosecutrix for kidnapping. After fifteen days on 22.10.1987, prosecutrix came to the police station along with her husband and filed FIR that rape was committed upon her by accused persons. According to the learned counsel how such type of story can be treated to be a probable story for the purpose of convicting the accused-appellants. Learned Sessions Judge has wrongly arrived at the finding that prosecution has proved its case with regard to charge of rape. Learned counsel for the appellants invited attention of the Court towards the finding of learned trial court at page No.15 of the judgment where the learned Sessions Judge observed that though no evidence of neighbours of the house where alleged rape was committed is produced but the statement of prosecutrix cannot be disbelieved

only on this ground because in the village area houses are not adjoining to each other. Likewise with regard to delay in filing FIR, it is observed in the judgment that delay is possible in case of rape because this is a social crime and there is question of reputation of the family involved. It is strange that learned Sessions Judge has considered the delay from 19.10.1987 when she reached the house of her husband but not considered this aspect of the matter that as per the prosecution story on 7.10.1987 she was kidnapped by the accused-appellants if it is so then obviously her husband or father was to file FIR and it is so expected from them also but learned Sessions Judge has only considered this aspect of the matter, which is totally erroneous. Learned counsel for the appellants argued that the FIR is totally result of enmity between the families of appellants Dhira, who is uncle of prosecutrix and out of ten prosecution witnesses PW-1 Uda, PW-2 Natha, PW-3 Kalu Singh, PW-6 Ramlal and PW-8 Vaga turned hostile before the Court. The conviction is totally based on the evidence of PW-5 Shanti (prosecutrix), PW-7 Laxman, husband of prosecutrix and PW-4 Bhagwan and PW-10 Dhula, both brothers of prosecutrix.

It is further contended by the learned counsel for the appellants that there was enmity between the family of prosecutrix and appellants. As

per the version given by accused-appellant Punja, he was dealer of controlled-price commodities and godown of such business was situated in the house of Laxman, who is husband of prosecutrix and accused-appellant Punja and husband of prosecutrix Laxman were partners in the said business and there was outstanding against the husband of prosecutrix, therefore, this false case has been registered because accused-appellant Punja was repeatedly asking for returning the money but this defence has not been accepted by learned trial court erroneously though the document with regard to license of dealership was filed before the trial court. In these circumstances, the conviction of the accused appellants is totally erroneous.

Learned counsel for the appellants has invited my attention towards the following judgments:

1. Gabbu Vs. State of M.P., reported in 2006 (2) WLC (SC) 152.
2. Dilip & Anr. Vs. State of M.P., reported in 2002 WLC (SC) Criminal 224.
3. Bheru Lal Vs. State of Raj., reported in 2006 (2) RDD 1205.
4. Noore Khan Vs. State of Raj., reported in 1996 Cr.L.R. (Raj.) 29.

I have heard learned counsel for the

appellants as well as learned Public Prosecutor and perused the record of the case as well as the judgments cited by learned counsel for the appellants.

In the present case, to prove the prosecution case, in all statement of 10 prosecution witnesses were recorded. Out of which PW-1 Uda, PW-2 Natha and PW-6 Ramlal, who are said to be the members of Panchayat, have turned hostile and PW-3, Kalu Singh, who was witness of recovery of cloths has also turned hostile. PW-4 Bhagwan and PW-10 Dhula, who are real brothers of prosecutrix, have reiterated their statement recorded under Section 161 Cr.P.C. Likewise PW-5 Shanti (prosecutrix) has reiterated her statement and made allegation of rape against three persons namely Punja, Dhira, and Sanna. Likewise, PW-7 Laxman (husband of prosecutrix) has also reiterated his statement before the court. PW-8 Vagha has also turned hostile but it is stated by him that PW-7 – Laxman, husband of prosecutrix, constituted a 'Panchayat' in which PW-6 – Ramlal (Sarpanch) and PW-1 Uda were also members and during the proceedings of Panchayat, it is stated by Laxman that there is outstanding of Rs.10,000/- in Punja and Laxman made a prayer before the members of Panchayat that Punja may be directed to return his money back otherwise, he will indulge him in a false case. PW-8 Vagha has denied that prosecutrix was recovered before him from

the possession of Punja though he has been declared hostile. The main question which arose for adjudication before this Court is that prosecution has proved its case beyond reasonable doubt or not. It is admitted fact of the case that members of Panchayat, which was said to be constituted for the purpose of recovery of prosecutrix Shanti have turned hostile before the court and only PW-7 Laxman, who is husband of prosecutrix and PW-4 Bhagwan and PW-10 Dhula, who are brothers of prosecutrix, are supporting the prosecution case.

In the present case, FIR was filed by prosecutrix herself on 22.10.1987 with regard to her kidnapping on 7.10.1987 wherein she stated that she was forcibly kidnapped by two persons namely Punja and Dhira when she was going to her in-laws house from the house of her father. No FIR whatsoever has been filed by any of the relatives of prosecutrix including husband, father and brothers of prosecutrix from 7.10.1987 till 22.10.1987. As per the prosecution case also, FIR was filed on 22.10.1987 by prosecutrix Shanti wherein it was categorically stated by her that on 19.10.1987, Ramlal, Vagha, Uda and Sabba came to the house of Sanna and they took her from the house of Sanna, thereafter, she went to the house of her husband on 19.10.1987. It was also stated in the FIR that abortion took place due to rape committed upon

her because she was carrying five months pregnancy. FIR was filed after fifteen days and there is no explanation whatsoever on record with regard to delay in filing the FIR. In this case, there is also very important aspect of the matter that a married woman was kidnapped and remained abducted for more than 15 days but none of the relatives including her husband, father and brothers have taken any steps to lodge FIR before Police Station and as per the FIR, the prosecutrix got released from the hands of accused-persons on 19.10.1987 by some persons and thereafter, she went to the house of her husband where also, she resided for three days but not filed any FIR till 22.10.1987 and thereafter, she lodged FIR on 22.10.1987. All the above circumstances clearly goes to show that there was a gross delay in filing FIR and there appears to be no compelling circumstances for any of the relatives of prosecutrix including husband, father and brothers to file FIR with regard to kidnapping of Mst. Shanti. No explanation whatsoever has been given by husband, father and brothers of the prosecutrix before the court for delay in filing the FIR. Therefore, the prosecution story creates suspicion with regard to the incident which is alleged by the prosecutrix. Further more, the facts that the proseuctrix was carrying five months pregnancy; and the same was aborted due to rape committed upon her by accused-persons, were to be corroborated by medical

evidence but these facts remained uncorroborated by medical evidence.

In the statement of PW-5 Mst Shanti (Prosecutrix) recorded before the court, she stated as follows :

> "..... मैं मेरे पीहर से रवाना हुई थी तब मेरे पांच महीने का गर्भ था । वह गर्भ सना द्वारा खोटा काम करने से सना के घर गिर गया ....."

As per the aforesaid allegation she was medically examined by Doctor on 22.10.1987. On that day, after medical examination, the medical jurist gave its finding which is as follows :

> "From the above physical, radiological and vaginal swab examination, I am of opinion that she is well above 18 yrs of her age on examination's days and no recent sign of sexual intercourse observed on her person she is habitual of this act and also of opinion that no recent sing of abortion observed."

The aforesaid opinion given by medical jurist vide medical examination report Ex-P/7 clearly reveals that the allegations levelled by the prosecutrix are not corroborated by the medical evidence.

With regard to conduct of PW-7 Laxman - husband of prosecutrix, it is clear that in his

statement, he admitted that he was having business of controlled price commodities with accused Punja but he refused that any amount was due towards Punja. It is stated by him that there was outstanding against Punja and he made his all efforts to get the money back. Meaning thereby, before this occurrence, both accused – Punja and PW-7 Laxman – husband of prosecutrix were carrying business together and there was dispute with regard to return of money in between both of them. The aforesaid evidence clearly ruled out that there was dispute in between husband of prosecutrix and accused Punja. Likewise, there is no independent witness or evidence on record of neighbourers where prosecutrix Shanti was unlawfully detained. It is also material fact that as per the statement of PW-5 Shanti, she was kept at different places by accused Dhira and Punja for near-about 12 days. If it is so then prosecution was under obligation to produce any evidence of this circumstance but upon record only three witnesses were produced by the prosecution for corroborating the prosecution case. Out of which two are real brothers of prosecutrix and one is husband of prosecutrix. However, all these three near relatives of prosecutrix never filed any FIR since 7.10.1987 till 22.10.1987 with regard to alleged incident. For the first, the prosecutrix herself after reaching her husband's house on 19.10.1987 filed FIR before the Police Station Thambola on 22.10.1987 and made

allegations against the accused-appellants. All these facts clearly reveal that the story narrated by the prosecutrix is not probable. It is true that for deciding cases of rape, only the evidence of prosecutrix is sufficient to arrive at with the finding of crime but in the case at hand, the facts are altogether different. As per the record, there is evidence that there was dispute in between PW-7 Laxman husband of prosecutrix and accused Punja who were carrying business together. Likewise, if a lady who is carrying five months pregnancy and due to rape, any abortion took place, then of course, it requires medical corroboration but in the present case, as per the medical examination report, there was no sign of abortion at the time of medical examination whereas as per the statement of PW-5 Mst. Shanti, the pregnancy come out at the house of Sana where she was recovered by some persons on 19.10.1987 and she was examined by medical jurist on 22.10.1987. The duration is of only three days in between medical examination and alleged abortion but it is not corroborated by medical evidence. More so, the Doctor gave its finding that upon examination, there was no recent sign of sexual intercourse observed. Meaning thereby, the prosecution has not proved it case beyond reasonable doubt. It is also very important to mention that accused Dhira is uncle of prosecutrix and according to statement of PW-4 Bhagwan, who is brother of

prosecutrix, accused Dhira himself asked him that don't file any FIR, first we should search Shanti.

In his statement PW-4 stated as follows :

> '..... एक दिन पहले मुलजिम धीरा ने मुझे कहा था कि अभी पुलिस में रिपोर्ट मत करवाओ, पता लगाते हैं उसके बाद ही पुलिस में रिपोर्ट करना । पंचों के सामने मुलजिम धीरा को पूछा गया तो उसने कहा कि वो कुछ नहीं जानता । कालूसिंह ने मुझे कहा कि मुलजिम धीरा ऐसा कह रहा है कि आज रात को शांति को लाकर सुपुर्द कर देंगें ।.....'

If it is so, then how accused Dhira was with the prosecutrix because as per the statement of PW-4 Bhagwan Lal, he was in the village. This statement of PW-4 Bhagwan creates suspicion. When there was no sign of recent intercourse and pregnancy in the medical evidence, then, in such circumstances, the story narrated by the prosecutrix cannot be treated to be believed because first of all there was gross delay of 15 days in filing the FIR and during this period none of the relatives of prosecutrix filed FIR before Police. For the first time, prosecutrix Shanti herself went to Police Station along with her husband and filed FIR on 22.10.1987 and stated that she was raped by three persons at different places and she was carrying a pregnancy of five months, that too, was resulted into miscarriage due to rape committed upon her by the accused-persons. Meaning thereby, this statement was to be corroborated by medical evidence

but medical evidence does not support the allegations levelled by the prosecutrix. Likewise, the conduct of her husband, who has stated that Shanti is his second wife and his first wife was Champa, who was real sister of Shanti and he was having business with accused Punja and he was having dispute with Punja and as per the statement of Vagha though he was declared hostile. It is stated by him that a threat was given by Laxman – husband of prosecutrix that if he will not pay his due amount then he will indulge Punja in a false case. All these facts clearly reveals that the prosecution has failed to prove its case beyond reasonable doubt and the benefit of doubt goes in favour of the accused-appellants. The story narrated by the prosecutrix is not supported by any independent witness or by medical evidence.

I have also gone through the judgment cited by learned counsel for the appellant in case of Dilip & Anr. Vs. State of M.P. (supra) wherein the Apex Court while dealing with the similar controversy has held that when evidence is not positively supported by medical evidence, it is difficulty to accept truthfulness of version of prosecutrix. Para-14 of the aforesaid judgment reads as follows :

> "The age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered herself to a

forced sexual assault without offering any resistance whatsoever. Without going into testing truthfulness of the explanation offered by the prosecutrix that because of being over-awed by the two accused persons she was not able to resist, the fact remains that the 'probabilities factor' operates against the prosecutrix. The gang rape is alleged to have been committed at about 2 p.m. in her own house, situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix did raise hue and cry to the extent she could and yet none was attracted to the place of the incident, the prosecutrix is said to have sustained injuries, also bleeded from from her private parts staining her body as also the cloths which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of blood-stains is not confirmed by forensic science laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix as given in the Court. The learned counsel for the State relied on Section 114A of Evidence Act, 1872 which provides that in a trial on a charge under Section 376(2) (g) of IPC on the prosecutrix stating that she was not a consenting party, the Court shall presume absence of consent of the woman alleged to have been raped. Suffice it to be observe that we should not misunderstood as recording a finding that the prosecutrix was a willing party to sexual intercourse by the accused persons. The court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault so alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory. The defence has given suggestion in cross-examination for false implication of the accused persons which however have not gone beyond being suggestions merely. It is not necessary for us to dwell upon further to find out the probability of truth contained in the suggestions because we are not satisfied generally of the correctness of

> story as told by the prosecutrix. We find it difficult to hold the prosecutrix in the cases as one on whose testimony as implicit reliance can be placed."

In these circumstances and taking into account the aforesaid enunciation by Apex Court, it is clear that the prosecution has failed to prove its case beyond reasonable doubt and the trial court has committed an error while convicting the appellant. Thus, it would not be proper to convict the appellant for the alleged offence under Section 376 I.P.C.

As per the judgment of trial court dated 8.8.1988, accused-appellants Punja and Dhira were also convicted and sentenced for committing offence under Sections 366 and 344 I.P.C. Though as per the discussions above, the prosecution has failed to prove its case for committing offence under Section 376 I.P.C. But for the purposes of convicting the accused appellants Punja and Dhira for committing offence under Section 366, there is sufficient evidence of PW-5 Shanti on record that accused-appellants Punja and Dhira abducted her. This fact is further corroborated from other evidence of PW-4 Bhagwanlal, PW-7 Laxman and PW-10 Dhula that prosecutrix Shanti was abducted and they made search but she was not recovered and at last on 19.10.1987, prosecutrix Shanti reached at her husband's house and narrated the story. Meaning thereby, the offence of kidnapping is proved by the

oral evidence produced on record by the prosecution.

Learned trial court convicted the accused appellants Punja and Dhira for offence punishable under Sections 366 sentenced them to suffer three years RI with a fine of Rs.1500/-, in default to further undergo three months simple imprisonment. Accused-appellants Punja, Dhira, Sanna and Hurma were also convicted for offence punishable under Section 344 I.P.C. and sentenced to suffer one year RI with a fine of Rs. 500/- and in default, to further undergo one month simple imprisonment.

Accordingly, there is sufficient evidence produced on record by the prosecution against the accused-appellants namely Punja and Dhira for commission of offence punishable under Section 366 and 344 I.P.C. and against accused-appellant Sana for offence under Section 344 I.P.C. However, the prosecution has proved its case against the accused-appellant Hurma for offence under Section 343 I.P.C. and not for offence under Section 344 I.P.C. because as per statement of Shanti, she was confined in the house Hurma for three days which is less than ten days.

It is also true that as per the above discussions, the prosecution has failed to prove its

case for committing offence under Section 376 I.P.C. because medical evidence is not corroborating the version of prosecutrix as well as no cloths or any material was recovered during the investigation. Therefore, obviously, though the prosecution has failed to prove its case for committing offence under Section 376 I.P.C. but as per the judgment of learned trial court there is sufficient evidence against the accused-appellants Punja and Dhira with regard to commission of offence punishable under Section 366 and 344 I.P.C. and against accused-appellant Sanna with regard to commission of offence under Section 344 I.P.C. Therefore, finding of learned trial court against the accused-appellants namely Punja and Dhira with regard to commission of offence under Sections 366 and 344 I.P.C. and against accused-appellant Sanna with regard to commission of offence under Section 344 I.P.C. does not require any interference by this Court. However, the prosecution has proved its case for offence under Section 343 I.P.C. against the accused-appellant Hurma and not for offence under Section 344 I.P.C.

Therefore, this appeal is partly allowed and on the basis of discussions as above, the impugned judgment dated 8.8.1988 passed by trial court is modified and the judgment of trial court is set aside to the extent of conviction under Section 376 I.P.C.

Accordingly, the accused-appellants namely Punja, Dhira and Sanna are acquitted from the charge of offence under Section 376 I.P.C. However, sentence awarded to accused-appellants Punja and Dhira for offence under Section 366 I.P.C. is reduced to the period of imprisonment already undergone because they have remained in jail since 25.10.1987 till they were ordered to be released on bail by this Court vide order dated 17.11.1988 and actually released on bail on 25.11.1988 that is to say for about 13 months. Therefore, their sentence is reduced from three years to already undergone. However, the conviction of one year of imprisonment of accused-appellants Punja, Dhira and Sanna for offence under Section 344 I.P.C. is maintained, which they are already served.

As per the statement of prosecutrix Shanti, she was illegally confined for three days at the house of Hurma which is less than ten days, therefore, offence under Section 344 is not proved against accused-appellant Hurma but upon the statement of prosecutrix she was illegally confined for three days at the house of Hurma, therefore, conviction of Hurma is modified and he is convicted for offence under Section 343, I.P.C. and punishment awarded to accused-appellant Hurma is reduced to the period of imprisonment already undergone.

The appellants are on bail. The bail bonds furnished by them stand discharged.

(GOPAL KRISHAN VYAS) J.